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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

T.H. BELL, SECRETARY OF EDUCATION,
Petitioner,

vs.

STATE OF NEW JERSEY,
Respondent.

T.H. BELL, SECRETARY OF EDUCATION,
Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

BRIEF AMICUS CURIAE OF THE COLLEGE OF THE SEQUOIAS AND THE NATIONAL ASSOCIATION OF STUDENT FINANCIAL AID ADMINISTRATORS IN SUPPORT OF BRIEFS FOR THE RESPONDENTS

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The College of the Sequoias and the National Association of Student Financial Aid Administrators submit this brief amicus curiae in support of the Briefs of Respondents State of New Jersey and Commonwealth of Pennsylvania. The College of the Sequoias and the National Association of Student Financial Aid Administrators urge the Court to uphold the decision of the Third Circuit in The State of New Jersey Department of Education v. Hufstedler, 662 F.2d 208 (3d Cir. 1981).

INTEREST OF AMICUS CURIAE

The College of the Sequoias and the National Association of Student Fianancial Aid Administrators ("NASFAA") are greatly interested

in this Court's decision on the issues before it in the appeal of New Jersey v. Hufstedler, supra. Their interest stems from the Department of Education's administration of student financial aid assistance programs pursuant to Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. Sections 1070-1098. As in the situation presented by Respondents, the Department of Education has attempted to recoup financial aid funds from the College of the Sequoias and member institutions of NASFAA with no statutory authority to support its actions. The funds in question have already been paid to students and the Department of Education contends that they were

paid in violation of the Department's regulations.

The National Association of Student Financial Aid Administrators ("NASFAA") is a non-profit corporation of postsecondary institutions, individuals, agencies and students interested in promoting the effective administration of student aid in the United States. NASFAA has a membership of 2,751 institutions and is the largest higher educational association headquartered in Washington D.C. Members of the NASFAA administer approximately eighty percent (80%) of all Title IV and Health Professions student financial assistance. The corresponding

monetary amount is approximately $7.8 billion. The Department of Education contends that approximately $700 million dollars of student financial assistance has been misspent. NASFAA disagrees with this figure on the basis that the quality control study from which the figures are derived is not accurate. NASFAA has a very real interest in the outcome of this case inasmuch as the Department of Education has attempted to recoup what it believes to be misspent financial aid funds without any statutory authority.

The College of the Sequoias participates in the Title IV financial aid programs pursuant

to the terms of 20 U.S.C. Section 1070, et seq. It is interested in this case because the Department of Education has demanded reimbursement of approximately Three Hundred Thousand Dollars ($300,000.00) based upon its unilateral determination that the College spent Title IV funds between the years 1974 to 1979 in violation of the Department's regulations.

The Department of Education's administration of Title IV funding is strikingly similar to the administration of Title I funding in the following respects:

1. participating institutions must comply with certain statutory requirements in order to receive Title IV

funds on behalf of eligible students;

2. participating institutions, (specifically the College of the Sequoias,) receive Title IV funds to be dispersed to eligible students largely by way of a cash advancement method (as opposed to a cash reimbursement method);
3. the Department of Education audits participating institutions to ensure compliance with the pertinent statutory requirements.

The Department's demand for reimbursement from the College of the Sequoias followed the Department's audits of the

College's compliance with Title IV. In August of 1978, the Office of Education conducted a program review of the College's Student Financial Aid programs. The Department of Health, Education and Welfare (predecessor to the Department of Education) identified several weaknesses in the College's administration of financial aid programs. These areas included lack of adequate documentation in the institutional files and failure to comply with revisions in the regulations. The Department instructed the College to perform a comprehensive audit of its financial aid programs covering the last five years of program participation in acordance with the

HEW Audit Guides.

The College did retain a Certified Public Accountant who issued an audit of Basic Education Grant Programs for the years of July 1, 1974 to June 30, 1979. The CPA concluded that the College had implemented proper procedures to comply with Title IV requirements. He also determined that approximately Seven Hundred Eighty-One Thousand, Six Hundred Fifteen Dollars ($781,615.00) had been given to students who did not have "affidavits of educational purpose" in their files. The College subsequently received permission to attempt to obtain and retroactively restore the missing affidavits to the student files so

that the Department of Education issued a final audit determination and demanded reimbursement of $292,82.00 for those files which did not contain the restored affidavits of educational purpose.

This demand was made despite the fact that the sole remedies for noncompliance with Title IV are the limitation, suspension or termination of the eligibility for any program or the imposition of a civil penalty; and despite the fact that no opportunity for a due process hearing was provided.[1]

Moreover, when the lack of due process was specifically addressed to the Department of Education, it still did not offer any form of due process. The

situation is all the more egregious when one recognizes that the reimbursement is based on the failure of the student's to sign affidavits of their intention to use the funds for educational purposes. (20 U.S.C. §§1091). There is no claim by the Department of Education that the funds were not actually used for their lawful and intended purposes. The College of the Sequoias was denied the opportunity to demonstrate that the funds were in fact used for educational purposes.

In compliance with 20 U.S.C. Section 1094, the Department has adopted regulations regarding procedures for fines, suspension, limitation and terminations. These

regulations provide for notice and an opportunity for a hearing as specified by the statute. 34 CFR 668.71 et seq. Included with these regulation is a provision entitled "Reimbursements, Refunds, and Offsets." 34 CFR 668.83. The Department cites 20 U.S.C. 1094 for authority to enact this regulation.[2] Again, Section 1094 provides no authority whatsoever for reimbursements, refunds or offsets.

Compounding the Department's lack of authority is the fact that it provides for no form of due process in its reimbursement regulation. That is, once the Department determines unilaterally that an institution

has misspent funds it gives itself the right to reimbursement of what it deems to be misspent funds, without the opportunity for the institution to respond or have entitlement to a hearing. In short, the Department is prosecuter judge, jury, and appellate tribunal[3]

The reimbursement regulation became effective in December, 1980 after the College of the Sequoias had allegedly misspent the funds by providing them to students who may not have signed affidavits of educational purpose.

Consequently, the implications of this Court's decision in the instant appeal are of major significance to NASFAA and its 2751 member institutions such as the College of Sequoias.

SUMMARY OF ARGUMENT

The Third Circuit of Appeals decision in New Jersy v. Hufstedler supra, should be upheld in light of its statutory interpretation and conclusion that a federal agency is limited to the remedy Congress prescribes. Further, its holding that the Government's common law right to recoupment should be exercised by filing an action in a court of competent jurisdiction is both lawful and equitable. If the law were to be held otherwise, the federal agency could, on its own whim, demand recoupment.

In the alternative, and without conceding the argument as stated above, the College of the Sequoias and NASFAA urge this Court to limit

any decision to overturn the New Jersey case to those situations where adequate due process has been provided.

ARGUMENT

I

THE THIRD CIRCUIT DECISION IN NEW JERSEY v. HUFSTEDLER IS A WELL-REASONED APPLICATION OF THIS COURT'S HOLDING IN PENNHURST v. HALDERMAN AND SHOULD BE UPHELD TO LIMIT THE OFT-TIMES UNBRIDLED DISCRETION OF FEDERAL AGENCIES

This Court specifically held in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 101 S.Ct. 1531 (1981) that when Congress seeks to impose conditions

on the grant of moneys, it must do so unambiguously:

> "Turning to Congress' power to legislate pursuant to the Spending Power, our cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States. (citations omitted) Unlike legislation enacted under §5, however, legislation enacted pursuant to the Spending Power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally

imposed conditions. The legitimacy of Congress' power to legislate under the Spending Power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract' (citations omitted). There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of moneys, it must do so

unambiguously. (fn. omitted) (citations omitted). By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." Id. 101 S.Ct. 1539-1540

Relying on this principle, the Third Circuit held that the Department of Education did not have the authority to recoup what it determined to be misspent funds absent statutory authority to do so. The Court rejected the Department's argument that the 1978 amendments to the Elementary and

Secondary Act of 1965, as amended 20 U.S.C. §§2701 et seq. should be applied to funds misspent prior to 1978. The Court held that under the Pennhurst rationale recoupment was not an unambiguous condition upon which the Title I grants were made prior to 1978.

Title IV of the Higher Education Act of 1965 as amended, 20 U.S.C. Sections 1070-1098 likewise does not provide for recoupment of allegedly misspent funds. Moreover, Title IV has never been amended to provide for administrative recoupment as was Title I. The failure of Congress specifically to provide authority for the Department of Education to

demand recoupment in the Title IV programs in the face of Congress' grant to the very same Department of Education the authority to recoup funds in the Title I programs is clear Congressional intent that no such right exists under Title IV.

Thus, if this Court were to hold that federal agencies have the authority to demand recoupment absent Congressional authority, it would be an obvious contradiction of Congressional intent. This result is all the more apparent when it could be applied to each agency of the federal government. Here, we are only considering what must be a reasoned and conscious Congressional inconsistency,

(i.e. providing for recoupment in Title I and not Title IV) in the Department of Education's administration. The effect on all of the grant-in-aid programs could be devastating.

Recognizing that recipients of federal grants should not be entitled to misappropriate funds without Governmental recourse, it is rational that this recourse should be limited to those remedies Congress has specifically provided. As the Court in Hufstedler stated in its holding that the Department of Education did not have the right to administrative recoupment:

> "...[W]here a legislative body provides for liability

coupled with a special statutory remedy, 'that remedy and that alone, must be employed.' Pollard v. Bailey, 87 U.S. (20 Wall.) 520, 527, 22 L.Ed. 376 (1874). See also National Railroad Passangers, 414 U.S. 453, 458, 94 S.Ct. 690, 693, 38 L.Ed. 2d 646 (1974) ('A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy..., courts should not expand the coverage of the statute to subsume other remedies.')" 622 F.2d at 216 [Emphasis added]

The Court went on to hold that

in advance-funding schemes such as Title I, the agency may only rely on a common-law right to recoupment by maintaining a civil action in a court of competent jurisdiction, stating that:

> "Administrative agencies, however, are purely creatures of statute, and their authority is statutorily circumscribed. To allow an agency to assume powers that it considers appropriate in carrying out its duties but which have not been allotted to it by Congress would attribute legislative powers to the excutive branch and disturb the balance in our

tripartite system of government. More important, perhaps, would be the absence of due process in a system where agencies charged with administering the multitude of federal grant programs were free to augment or abridge the rights and obligations forming the contractual basis of the grantees' participation." 662 F.2d at 218.

This holding is supported by the Supreme Court decision relied upon by the Department of Education in arguing that it has the common law right to recoupment, United States v. Wurts, 303 U.S. 414 (1938). In

that case a judicial suit rather than an administrative remedy was initiated in order to recover moneys.

Further, the situation presented by the College of the Sequoias is a superb example of the Department of Education's use of unbridled discretion. Here, not only is the Department demanding reimbursement without statutory authority, but it is doing so without any due process whatsoever. There has been no response to the College's contention that it has not been provided due process. This situation, while a major concern to the College, is one small example of the current abuse of discretion

and a mere foreshadowing of the devastating effect a decision to overrule the Third Circuit opinion could have on federal grant recipients.

It also should be noted that the Third Circuit decision is particularly appropriate when compared with the case which is in conflict with the Third Circuit, i.e., State of West Virginia v. Secretary of Education, 667 F.2d 417 (4th Cir. 1981). In that case, the Court made no reference to this Court's decision in Pennhurst nor did it discuss the legislative history of Title I. It was not a reasoned decision; rather, it made a bold conclusion that the Department of Education could apply

the 1978 amendments retroactively. It further held that absent those amendments, the Department of Education had the right to recoupment. It did not even consider the issue of why, if the Department had always had that right, Congress felt it necessary to amend the statute to provide specifically for the right to recoupment.

Support for the New Jersey v. Hufstedler decision is found in State of California v. Block, 663 F.2d 855 (9th Cir.1981) and Lieberman v. University of Chicago, 660 F.2d 1185 (7th Cir. 1981), cert.denied, 102 S.Ct. 1993 (1982). In the Ninth Circuit Block Opinion, the Court

held that the Department of Agriculture did not have the authority to issue a regulation which did not conform with the statutory provisions.[4] It also noted that the current statute could not be applied retroactively, citing Pennhurst State School and Hospital v. Halderman, supra, and State of New Jersey Department of Education v. Hufstedler, supra.

Similarly, the Seventh Circuit in Lieberman held that the prohibition of sex discrimination in the Education Amendments of 1972 did not provide a damages remedy to an individual allegedly made a victim of sexual discrimination. The Court primarily relied on Pennhurst in reaching its decision.

In summary, if this Court does not uphold the Third Circuit opinion, federal agencies could then administer programs with unfettered discretion, assessing penalties and recoupment as their own departments deem them appropriate. It would virtually nullify Congressional intent in those situations in which Congress has specified limited remedies.

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II

ASSUMING ARGUENDO THAT THIS COURT DECIDES TO OVERRULE NEW JERSEY v. HUFSTEDLER, SUCH A HOLDING SHOULD BE LIMITED TO THOSE SITUATIONS WHERE ADEQUATE DUE PROCESS HAS BEEN PROVIDED.

A logical extension of granting federal agencies the authority to demand recoupment where a statute specifies remedies other than recoupment is the demand for reimbursement without any form of due process. This situation is not mere conjecture. As set forth previously, the Department of Education is engaging in this very activity. With absolutely no statutory authority it has adopted

a regulation providing for reimbursements and offset. This regulation is not accompanied by any due process rights, contrary to the regulations and statute regarding suspension, limitation, termination and fines.

Therefore, it is necessary for this Court to narrow any decision providing for an agency's right to reimbursement to those situations where adequate due process has been provided.

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CONCLUSION

The College of the Sequoias and the National Asociation of Financial Aid Administrators urge this Court to uphold the Third Circuit decision in State of New Jersey Department of Education v. Hufstedler, supra for the above stated reasons.

Respectfully submitted,

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20 U.S.C. Section 1094 (b)(1)(d) provides:

"Notwithstanding any other provisions of this subchapter and part C of subchapter I of chapter 34 of Title 42, the Secretary is authorized to prescribe such regulations as may be necessary to provide for [the] limitation, suspension, or termination of the eligibility for any program under this subchapter and part C of subchapter I of chapter 34 of Title 42 of any otherwise eligible institution, or the imposition of a civil penalty under paragraph (2)(B) wherever the Secretary has determined after reasonable notice and opportunity for hearing on the record, that such institution has violated or failed to carry out any provisions of this subchapter and part C of subchapter I of chapter 34 of Title 42, except that no period of suspension under this section shall exceed sixty days unless the institution and Secretary agree to an extension or unless limitation or termination proceedings are initiated by the Secretary within that period of time." [Emphasis added]

[2] 20 U.S.C. Section 2132(a)(2) provides that regulations issued by the Department of Education "... shall contain immediately following such substantive provisions of such regulations, citations to the particular section or sections of statutory law or other legal authority upon which such provision is based."

[3] Interestingly, Title IV programs are not covered by the General Education Provisions Act, specifically 20 U.S.C. §1234a regarding the due process proceudres. Further, there has been no amendment to the Higher Education Act specifically authorizing repayment of misspent funds as there was in Title I.

[4] This case is of particular importance to the College of the Sequoias and NASFAA since the Department of Education has similarly adopted a regulation (reimbursement) for which it has no statutory authority.